



DEPARTMENT OF THE NAVY
BOARD FOR CORRECTION OF NAVAL RECORDS
2 NAVY ANNEX
WASHINGTON DC 20370-5100

BJG
Docket No: 4595-99
27 April 2000

[REDACTED] RET

Dear Major [REDACTED]

This is in reference to your application for correction of your naval record pursuant to the provisions of title 10 of the United States Code, section 1552.

A three-member panel of the Board for Correction of Naval Records, sitting in executive session, considered your application on 26 April 2000. Your allegations of error and injustice were reviewed in accordance with administrative regulations and procedures applicable to the proceedings of this Board. Documentary material considered by the Board consisted of your application, together with all material submitted in support thereof, your naval record and applicable statutes, regulations and policies. In addition, the Board considered the advisory opinions furnished by Headquarters Marine Corps dated 11 January and 7 February 2000, copies of which are attached. They also considered your counsel's rebuttal letter dated 21 April 2000.

After careful and conscientious consideration of the entire record, the Board found that the evidence submitted was insufficient to establish the existence of probable material error or injustice. In this connection, the Board substantially concurred with the comments contained in the advisory opinion dated 11 January 2000.

The Board was unable to find that allegations of your alcohol dependency or abuse were a factor in your removal from the report of the Fiscal Year (FY) 1997 Lieutenant Colonel Selection Board. In this regard, they noted the Commandant of the Marine Corps memorandum of 26 August 1996 for the Secretary of the Navy, paragraph 2, stated "Subsequent psychiatric and alcohol abuse/dependency evaluations '...did not suggest an ongoing psychopathology,...' nor find alcohol abuse/dependency to a degree that it will interfere with [your] duties." While you may not have been advised, until after the convening of the FY 1998 Lieutenant Colonel Selection Board, that derogatory material concerning your removal from the FY 1997 report had been placed in your record, the material placed in your record included your statements in rebuttal. Therefore, they found that this matter did not support removing your failure by the FY 1998 Lieutenant Colonel Selection Board. They

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were unable to accept your allegation that your removal from the report of the FY 1997 Lieutenant Colonel Selection Board was "a result of other incidents of a public nature involving service members, which have caused the various military branches concern because of media attention."

Regarding your implied request to remove the Department of the Navy Central Adjudication Facility letter dated 8 February 1993, Subject: Intent to Revoke Security Clearance, the Board noted that this document is not in your current Official Military Personnel File. They were unable to determine when this document was removed. However, they found that if it appeared in your record for the FY 1998 and 1999 Lieutenant Colonel Selection Boards by which you failed, its impact would have been negligible in light of the derogatory documentation of your removal from the report of the FY 1997 promotion board.

In view of the above, your application has been denied. The names and votes of the members of the panel will be furnished upon request.

It is regretted that the circumstances of your case are such that favorable action cannot be taken. You are entitled to have the Board reconsider its decision upon submission of new and material evidence or other matter not previously considered by the Board. In this regard, it is important to keep in mind that a presumption of regularity attaches to all official records. Consequently, when applying for a correction of an official naval record, the burden is on the applicant to demonstrate the existence of probable material error or injustice.

Sincerely,

W. DEAN PFEIFFER
Executive Director

Enclosures

Copy to:
David P. Voerman, Esq,



4595-99

DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
2 NAVY ANNEX
WASHINGTON, DC 20380-1775

IN REPLY REFER TO:

1070

JAM2

11 OCT 1997

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF MAJOR [REDACTED]
U.S. MARINE CORPS (RETIRED)

Ref: (a) Marine Corps Individual Records Administration Manual
(IRAM), para. 1000.4.c(2)6

1. We are asked to provide an opinion on Petitioner's request to remove from his official record all entries related to the removal of his name from the fiscal year 1997 (FY97) Marine Corps Lieutenant Colonel Selection Board Report.

2. We recommend that the requested relief be denied. Our analysis follows.

3. Background. On 17 October 1996, the President removed Petitioner's name from the FY97 Marine Corps Lieutenant Colonel Promotion Selection Board Report. The basis for this action was a 1992 incident in Charleston, S.C. that ended with a civilian woman running around Petitioner's condominium complex in the early morning hours, naked and screaming for help. According to the woman, Petitioner had sexually assaulted and forcibly sodomized her, in addition to forcing her to engage in what need only be described as bizarre sexual activities. When contacted by the Charleston Police Department, Petitioner admitted having engaged in unspecified sexual intimacies that were "gross and embarrassing," but claimed that all of the acts were consensual and that he did not understand why the woman suddenly started screaming and ran out of his home naked. Petitioner was not prosecuted by either civilian or military authorities based on the incident; he was, however, issued a non-punitive letter of counseling based on this incident, as well as three previously reported instances of alcohol-related misbehavior. Petitioner was also allowed to maintain a Top Secret security clearance after his qualifications were scrutinized because of the allegations.

4. Analysis

a. Petitioner presents what is in essence a fairness argument, asserting that his name should not have been removed

Subj: BOARD FOR CORRECTION OF NAVAL RECORDS (BCNR) APPLICATION
IN THE CASE OF MAJOR [REDACTED] 3
U.S. MARINE CORPS (RETIRED)

from the Board Report based upon allegations that were so unsupported by evidence that no disciplinary action was ever taken, and that did not render him unqualified to hold a Top Secret security clearance. Petitioner also complains that he was prejudiced before subsequent promotion selection boards because he was not afforded the opportunity to examine and rebut adverse material that was made a part of his OMPF following his removal from the FY97 Board Report. Neither argument provides a basis for relief.

b. The fact that there was insufficient evidence to warrant prosecution by civilian and military authorities does not mean that available evidence could not reasonably undermine the confidence of the Commandant of the Marine Corps and the Secretary of the Navy in Petitioner's qualification for promotion. Deciding whether prosecution is warranted and deciding whether promotion is deserved involve two entirely different standards. Petitioner was afforded, and exercised, his rights in the promotion removal process to notice and comment, and that is all that law and fairness required.

c. Matters related to Petitioner's removal from the Board Report were properly made part of his OMPF in accordance with reference (a), and he was put on notice that this action was being taken. These matters included his statements in rebuttal. Petitioner was therefore aware of both the adverse and rebuttal materials that were in his OMPF, and remained free to correspond directly with the presidents of subsequent selection boards to present additional rebuttal material if he wished. Petitioner's argument that it was improper or unfair for the material to become part of his record is unfounded, as is his complaint that he was deprived of the opportunity to address those matters with subsequent boards.

5. Conclusion. Accordingly, for the reasons noted, we recommend that the requested relief be denied.

[REDACTED]
[REDACTED] JR.

Head, Military Law Branch
Judge Advocate Division



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DEPARTMENT OF THE NAVY
HEADQUARTERS UNITED STATES MARINE CORPS
MANPOWER AND RESERVE AFFAIRS DEPARTMENT
HARRY LEE HALL, 17 LEJEUNE ROAD
QUANTICO, VIRGINIA 22134-5104

IN REPLY REFER TO:
1412/2
MMPR
7 Feb 00

MEMORANDUM FOR THE EXECUTIVE DIRECTOR, BOARD FOR CORRECTION OF
NAVAL RECORDS

Subj: BCNR APPLICATION IN THE CASE OF MAJOR [REDACTED]
[REDACTED] USMC (RETIRED)

Encl: (1) SecNav memo 1400 MMPR dtd 4 Jan 96
(2) CMC ltr 1420 JAM01 dtd 6 May 96
(3) [REDACTED] ltr 1420 RDC/j dtd 15 May 96
(4) President's memo of 7 Oct 96
(5) CMC ltr 1400 MMPR dtd 19 Nov 96

Ref: (a) MMR Route Sheet of 8 Oct 99

1. The reference requested an advisory opinion in the case of Major [REDACTED] Major [REDACTED] requesting the removal of the information pertaining to his removal from the FY97 USMC Lieutenant Colonel Promotion Selection Board Report from his Official Military Personnel File (OMPF), and reinstatement to the same with date of rank, pay, and allowances as if he had been promoted by the subject board.

2. The following facts are germane to this case:

a. As identified in enclosure (1), [REDACTED] was selected by the FY97 Lieutenant Colonel Promotion Selection Board, and his name was withheld by the Secretary of the Navy in the board's Nomination report dated 1 February 1996.

b. [REDACTED] withheld due to allegations of rape and sodomy in July 1992.

c. Per Title 10, U. S. Code § 618, [REDACTED] was provided written notice of the grounds for his withhold, and possible removal from the promotion list, enclosure (2) applies.

d. Per enclosure (3), [REDACTED] provided comment to the Commandant of the Marine Corps and the Secretary of the Navy on 15 May 1996 regarding the circumstances associated with this incident.

Subj: BCNR APPLICATION IN THE CASE OF MAJOR [REDACTED]
[REDACTED] 3 USMC (RETIRED)

e. After thoroughly reviewing [REDACTED]'s statements and the entire incident report, the Commandant of the Marine Corps recommended to the Secretary of the Navy to remove his name from the board report. Although never prosecuted, Major [REDACTED] actions at that incident caused the Commandant of the Marine Corps to "have serious reservations about his judgment and character". Both the Secretaries of the Defense and Navy concurred, and forwarded the removal recommendation to the President of the United States, who in turn removed Major [REDACTED]'s name from the board report on 17 October 1996. Enclosure (4) is provided.

f. Per enclosure (5), [REDACTED] was notified that his name was removed from the board report, and documentation regarding this incident would be inserted into his OMPF regarding this incident.

3. Based on Title 10, U. S. Code § 624, the President of the United States had cause to believe that [REDACTED] "was morally unqualified for promotion". Regardless of the fact that he was not prosecuted for this incident, it caused each level of command grave reservation about his judgement and character. It is central to understand that the standards for promotion and prosecution are not parallel. It was determined that Major [REDACTED] not qualified for promotion to the grade of lieutenant colonel.

4. Due to the rule of administrative finality cited by the Supreme Court, Presidential action cannot be undone and reinstatement to the promotion list would be unlawful.

5. Based on the foregoing analysis I strongly recommend that Major [REDACTED] petition be denied.

6. The point of contact in this matter is [REDACTED]
Head, Officer Promotion at extension [REDACTED]

[REDACTED]
Colonel [REDACTED]
Head, Promotion Branch